

Mohan (Migration) [2021] AATA 3734 (30 September 2021)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Lalit Mohan
CASE NUMBER:	1825371
DIBP REFERENCE(S):	CLF2014/40392
MEMBER:	SM Justin Owen
DATE:	30 September 2021
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Statement made on 30 September 2021 at 4:20pm

CATCHWORDS

MIGRATION – Partner (Residence) (Class BS) visa – Subclass 601 (Partner) – genuine and continuing relationship – relationship ended and sponsorship withdrawn – health and finances – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 5CB(2)(b), 5F(2)(c), 65, 359(2), 359A, Migration Regulations 1994 (Cth), Schedule 2, cl 801.221(2)(b)

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 20 August 2018 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 14 March 2014 on the basis of his relationship with his sponsor. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.801.221 because the delegate was not satisfied the applicant was in a genuine and continuing relationship with the sponsor as required under sections 5F(2)(c) and 5CB(2)(b) of the Act. Accordingly, the delegate found she was not satisfied the applicant was the spouse or de facto partner of the sponsor.
4. The Tribunal received from the applicant a valid application for review on 31 August 2018.
5. The Tribunal exercised its discretion to hold the hearing by teleconference. The hearing was held during the COVID-19 pandemic. The Tribunal determined it was reasonable to hold a hearing by telephone, having regard to the nature of this matter and the individual circumstances of the applicant. The Tribunal also had regard to the Tribunal's objective of providing a mechanism of review that is fair, just, economical, and quick, and the delay to the matter if the hearing was not to be conducted by telephone. The Tribunal is satisfied that the applicant was given a fair opportunity to give evidence and present arguments.
6. The applicant appeared before the Tribunal on 29 September 2021 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Hindi (Indian) and English languages.
7. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The Tribunal has before it the Department's file relating to the applicant: CLF2014/40392; the Tribunal's own file 1825371; and a copy of the Departmental decision record provided by the applicant to the Tribunal.
9. As noted above, the applicant applied for the visa on 14 March 2014 on the basis of his relationship with his sponsor. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Regulations. The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. There are no criteria to be satisfied at the time of the application: cl.801.21. The primary criteria to be satisfied at the time of the decision are set out in cl.801.22. Clause 801.221(1) requires an applicant to meet the requirements of subclause (2), (2A), (3), (4), (5), (6) or (8).

10. Subclause 801.221(2) requires that the applicant is the holder of a Subclass 820 visa, is the spouse or de facto of the sponsoring spouse, continues to be sponsored for the grant of the Subclass 820 visa by the sponsoring spouse or the Australian citizen, Australian permanent resident or eligible New Zealand citizen who sponsored the applicant for that visa and, with limited exceptions, at least 2 years have passed since the application was made.
11. On 29 March 2019 the Department received correspondence from the applicant's sponsor, Ms Monika Arora, withdrawing her sponsorship of the applicant effective immediately. The sponsor stated she would not be responsible for any matters in relation to the applicant in the future in regards to either his visa or his stay in Australia (T1, Folio. 24). The sponsor provided similar information again to the Tribunal via correspondence on 2 April 2019 (T1, Folio. 26).
12. On 14 July 2021 the Tribunal wrote to the applicant pursuant to sections 359A and 359(2) of the Act inviting him to comment on or respond to information by 28 July 2021.
13. The particulars of the information were that the applicant had made an application for a Partner visa. It was pointed out that it is a requirement for the grant of that visa that at the time the application is made, and at the time of the decision, the applicant be the spouse or de facto partner of the sponsoring partner, unless one of the exceptions applies. The Tribunal pointed out that information on the Department's file indicated that the applicant's relationship with the sponsoring partner had ended.
14. The Tribunal pointed out that the information was relevant as the Tribunal may conclude that at the time of this decision, the applicant was no longer the spouse or de facto partner of the sponsor. The Tribunal stated that if it was not satisfied that the applicant was the spouse or de facto partner of the sponsor, and if he did not meet any of the alternative criteria for the grant of the visa, the Tribunal may conclude that he did not meet the requirements for the grant of the visa for which he had applied and the Tribunal may then affirm the decision under review.
15. The applicant was invited to comment on or respond to the above information in writing. He was also invited to provide in writing any claims he wished to make as to the exceptions under which he could be granted the Partner visa. These included the death of the sponsoring partner; family violence; and certain court orders or responsibilities in relation to children. The Tribunal invited the applicant to provide information that he believed may be relevant to these exceptions.
16. The applicant responded to the Tribunal in writing on 23 July 2021 (T1, Folio. 28). The applicant confirmed that his relationship with the sponsor had ended and he had filed for divorce. He stated that whilst he was no longer in a relationship with the sponsor, he wanted his chance to give "my side of the argument". He wrote that he wanted to present all the facts and the oral arguments to the Tribunal. He made no claims to any of the alternative criteria as outlined in the Tribunal's correspondence of 14 July 2021.
17. The applicant appeared via teleconference before the Tribunal on 29 September 2021 to give evidence and present arguments.
18. At the hearing the Tribunal asked the applicant if his relationship with the sponsor had ceased. He confirmed that the relationship had concluded. The applicant in oral evidence said his relationship with the sponsor ended in 2017. He told the Tribunal hearing that his divorce with the sponsor had been finalised in October 2018.
19. The Tribunal on the evidence before it, including the oral testimony of the applicant; his correspondence of 23 July 2021; and the former sponsor's letters of withdrawal of her

sponsorship from March/April 2019 that were put to the applicant under the relevant provisions, is of the opinion that at the time of decision, the relationship between the applicant and sponsor has ceased. The applicant cannot meet cl.801.221(2).

20. The Tribunal explained at the hearing that if the applicant was no longer in a relationship with his sponsoring partner, there were exceptions under which he could be granted the Partner visa. These included death of the sponsoring partner; family violence and certain responsibilities concerning children. The Tribunal asked the applicant if he wished to make any claims in relation to any of the exceptions available to him given the status of the relationship with the sponsor and the evidence from the applicant that the relationship had ceased.
21. The applicant in oral evidence confirmed that to the best of his knowledge, the sponsor was still living. There is no evidence before the Tribunal to suggest she is deceased. There is no claim made or evidence before the Tribunal that the sponsor has died.
22. The Tribunal raised the exception concerning children. The applicant said that he and the sponsor had no children together. He stated that the sponsor had a child from a previous relationship, but he had no ongoing legal role or responsibilities. There is no claim made or evidence before the Tribunal that the applicant meets the exception concerning responsibilities relating to children.
23. The Tribunal asked the applicant if he claimed to be a victim of family violence perpetrated by the sponsor. The applicant said that he and the sponsor had had some "minor arguments" during the relationship but "nothing major". No claim of family violence was made.
24. The Tribunal explained to the applicant at the hearing the challenges his review faced given his relationship with the sponsor had ended, and there was no evidence before it or claim made that he met any of the alternate criteria for the grant of a Partner visa. The Tribunal invited the applicant to raise any further issues he believed the Tribunal ought to be aware of. The applicant stated that he had married the sponsor in 2014 and their marriage had lasted three years, ending in 2017. He stated that he had got into the habit of living in Australia during this time. He stated the reason for his divorce from the sponsor was some health and back issues he had which led to financial problems. The Tribunal appreciates the applicant may prefer to reside in Australia and has become used to life in Australia after seven years. The Tribunal appreciates financial and health pressures can cause a strain on relationships. The Tribunal notes however, as outlined to the applicant at the hearing, that it is required to determine whether the applicant meets the criteria for the Partner visa he applied for in 2014. Given the relationship with the sponsor ended some years ago, and no claims have been made to the exceptions, the applicant is not able to meet the criteria for the grant of the Subclass 801 Partner visa.
25. The Tribunal is satisfied that at the time of decision, the applicant does not continue to be sponsored for the grant of the Subclass 801 visa by the sponsoring partner, who in this case is an Australian citizen, who sponsored the applicant for that visa: Clause 801.221(2)(b). Accordingly, the applicant cannot satisfy the criteria in cl.801.221(b).
26. Furthermore, the applicant has not claimed, and there is no evidence before the Tribunal, that the applicant meets the alternative criteria in cl.801.221 (2A), (3), (4), (5) or (6).

27. FINDINGS

28. On the basis of the applicant's own evidence, and the correspondence of his former sponsor that was put to him under sections 359A and 359(2) of the Act, the Tribunal is not satisfied

that at the time of this decision, the applicant is the spouse (as defined under section 5F of the Act) or the de facto partner (as defined under section 5CB of the Act) of the sponsoring partner. There is no claim made and no evidence before the Tribunal that the sponsoring partner has died. There is no claim made or evidence before the Tribunal of any children or responsibilities towards any children. The applicant has not made a claim of family violence for the Tribunal to consider as required by the Regulations. The Tribunal is not satisfied the applicant meets cl.801.221.

29. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

30. The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Justin Owen
Senior Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).